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11 UNITED STATES DISTRICT COURT

12 CENTRAL DISTRICT OF CALIFORNIA

13 GIGANEWS, INC., a Texas corporation;
14 LIVEWIRE SERVICES, INC., a Nevada
15 corporation,

16 Plaintiffs,

17 v.

18 PERFECT 10, INC., a California
19 corporation, NORMAN ZADA, an
20 individual, and DOES 1-50, inclusive

21 Defendants.
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Case No.: 2:17-cv-05075-AB (JPR)

Before Honorable André Birotte, Jr.

**DEFENDANTS' OBJECTIONS AND
RESPONSES TO PLAINTIFFS'
TRIAL BRIEF**

Trial Date: March 26, 2019

Time: 8:30 a.m.

Courtroom: 7B, 350 West First Street,
Los Angeles, CA 90012

1 The arguments made in Plaintiffs' Trial Brief are legally unfounded, and
2 should be rejected by the Court.

3 I. EVIDENCE REGARDING THE OFFER TO SETTLE

4 Preliminarily, Plaintiffs have already asked the Court to preclude evidence of
5 the offer to settle by means of a motion in limine (Plaintiffs' MIL No. 3). The Court
6 rejected their motion, concluding as follows:

7 "Here, Defendants proffer Zada's offer for several purposes: to show that Zada
8 did not attempt to frustrate Plaintiffs' efforts to collect the judgment, to show his
9 good character, **to show Plaintiffs' failed to mitigate damages**, and to rebut the
10 punitive damages claim. None of these purposes is barred by Rule 408(a)(1) because
11 none of them challenges the validity of the debt. Although such evidences is not
12 admissible as character evidence, see Fed. R. Evid. 404, it is arguably relevant for the
13 other stated purposes. Therefore, the Court will not exclude Zada's April 2015 offer
14 at this juncture." (Order at p. 5.)

15 The Court has therefore expressly reviewed the issue of the use of the offer
16 evidence for purposes of mitigation of damages arguments, and has allowed
17 Defendants to make such arguments. Plaintiffs' position has already been rejected,
18 and should be rejected again now.

19 In any event, Plaintiffs' legal position here is unfounded. The general rule in
20 California is that "[a] plaintiff who suffers damage as a result of either a breach of
21 contract or a tort has a duty to take reasonable steps to mitigate those damages and
22 will not be able to recover for any losses which could have been thus avoided."
23 (*Shaffer v. Debbas* (1993) 17 Cal. App. 4th 33, 41.) "The doctrine applies in tort,
24 wilful as well as negligent." (*Green v. Smith* (1968) 261 Cal. App. 2d 392, 396.)
25 This long-standing principle of law has not been suspended or eviscerated in
26 fraudulent transfer cases, and Plaintiffs cited law does not stand for such a
27 proposition.

28 Plaintiffs say mitigation of damages argumentation is legally foreclosed by

1 *Valle de Oro Bank v. Gamboa*, 26 Cal. App. 4th 1686, 1691 (1994). That case,
 2 however, deals with a completely inapposite factual situation, in which a defendant
 3 could not use the fact that a plaintiff had failed to purchase fire insurance on a vehicle
 4 to avoid damages for breach of contract.

5 Here, Defendants will argue that every cent of the judgment was offered to
 6 Plaintiffs, and they turned it down. Defendants are not arguing that Plaintiffs should
 7 have settled for something lesser “as ‘insurance’ against a later inability to collect”
 8 (Trial Brief at p. 2). Instead, they are asserting that the actual full amount of the
 9 judgment (and more!) was tendered, but yet Plaintiffs slapped it away, thereby
 10 unjustly exacerbating their damages. Defendants have the right to make such an
 11 argument to the jury.

12 **II. EVIDENCE RELATING TO DAMAGES**

13 Plaintiffs once again attempt to get the Court to adopt a rule prohibiting
 14 Defendants from pointing out the undeniable fact that both before and after the
 15 transfers at issue, Norm Zada deposited funds into Perfect 10. This is not a fact that
 16 goes toward the affirmative defense discussed in Plaintiffs’ brief; instead, it bears
 17 upon the simple matter of *damage calculation*. Plaintiffs are complaining that funds
 18 were improperly transferred from Perfect 10 to Dr. Zada; as a matter of simple logic,
 19 the total amount of such funds must be calculated by the jury, and the only way that
 20 can be done is to evaluate both the amount of money that went out and that which
 21 went in. Thus, the funds deposited into Perfect 10 after the last transfer was made
 22 must be put into consideration.

23 DATED: March 20, 2019

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24 By: /s/ Matthew C. Mickelson

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 27 and NORMAN ZADA
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